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Nos. 03-1116 & 03-1120 & 03-1274

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

JUANITA SWEDENBURG, *et al.*,
Petitioners,

v.

EDWARD D. KELLY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

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BRIEF FOR THE WINE AND SPIRITS WHOLESALERS OF AMERICA, NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, AMERICAN BEVERAGE LICENSEES, THE PRESIDENTS' FORUM OF THE BEVERAGE ALCOHOL INDUSTRY, AND THE ASSOCIATED FOOD DEALERS OF MICHIGAN AS *AMICI CURIAE* SUPPORTING PETITIONERS IN NOS. 03-1116 & 1120 AND RESPONDENTS IN NO. 03-1274

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF *AMICI CURIAE*	1
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE TWENTY-FIRST AMENDMENT AUTHORIZES STATES TO RESTRICT RETAIL SALES OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE VENDORS	6
II. THE DORMANT COMMERCE CLAUSE DOES NOT BAR STATES FROM RESTRICTING RETAIL SALES BY OUT-OF-STATE VENDORS	20
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).....6, 13, 26, 27
Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000) 17
Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) 28
C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 13
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)..... *passim*
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)..... *passim*
Carter v. Virginia, 321 U.S. 131 (1944)..... 12
Craig v. Boren, 429 U.S. 190 (1976)..... 13, 28
Duckworth v. Arkansas, 314 U.S. 390 (1941)..... 16
Fedway Associates v. U.S. Treasury, 976 F.2d 1416 (D.C. Cir. 1992)..... 8
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)..... 24, 28
Healy v. The Beer Institute, 491 U.S. 324 (1989) ... 28, 29
Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972) 23
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 5, 7, 23, 28
Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939)..... 22
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)..... 28
Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998) 28
Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938)..... 22

TABLE OF AUTHORITIES—Continued

	Page
McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990)	10
Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996)	27
National Distributing Co., Inc. v. U.S. Treasury Dept., 626 F.2d 997 (D.C. Cir. 1980)	8
North Dakota v. United States, 495 U.S. 423 (1990)	2, 6, 25, 26
Premier-Pabst Sales Co. v. Grosscup, 298 U.S. 226 (1936)	11, 22
Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946)	5, 20
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)	17, 20
State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936)	21, 24
Toomer v. Witsell, 334 U.S. 385 (1948)	28
Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939)	23
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	
U.S. Const. Am. XXI	6
Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a	*passim*
Webb-Kenyon Act, 27 U.S.C. §§ 121-122	5, 13, 20, 29
N.Y. Alco. Bev. Cont. Law § 100(1)	2
§ 102(1) (c)	2
Sup. Ct. R. 37.6	1
OTHER MATERIALS	
B. Bernard, *Liquor Laws* 26 (1949)	10, 14, 15
E. Behr, *Prohibition: Thirteen Years That Changed America* 232-33 (1996)	18

TABLE OF AUTHORITIES—Continued

Page

Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv. L. Rev. 1145 (1959)..... 10

L. V. Harrison & E. Laine, *After Repeal* 107-46 (1936)..... *passim*

P. Johnson, *A History of the American People* (1999)..... 8

R. B. Fosdick & A. L. Scott, Toward Liquor *Control* 149 (1933)..... 9, 10, 11

Reiter, Citizens or Sinners? The Economic and Political Inequity of 'Sin Taxes' on Tobacco and Alcohol Products, 29 Colum. J. of Law & Soc. Prob. 443 (1996)..... 18

Shankar, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353 (1999)..... 11, 12, 17

U.S. Dept. Of Commerce, State Liquor Legislation 156-63 (1941)..... 15

INTEREST OF AMICI CURIAE

Wine and Spirits Wholesalers of America, Inc., founded in 1943, is a national trade organization representing more than 370 licensed wine and spirits wholesaler companies in 44 States, the District of Columbia, and Puerto Rico that hold state licenses to act as wine and/or spirits wholesalers. The National Association of Beverage Importers, Inc. is a national trade association that represents the interests of beer, wine, and spirits importers. American Beverage Licensees, Inc. is an association representing the interests of beer, wine, and spirits retailers. The Presidents' Forum of the Beverage Alcohol Industry is a trade association that provides a forum for members' chief executives to respond to issues affecting the beverage alcohol industry. The Associated Food Dealers of Michigan, Inc. provides services to businesses engaged in distribution of food and other products. *Amici* and their members play significant roles in the distribution of alcoholic beverages under state licensing systems. *Amici* thus have a direct interest in the proper resolution of these cases, which involve challenges to those longstanding systems.[1]

STATEMENT

Like all States, Michigan and New York exercise strict control over the sale of alcohol within their borders. As part of their regulatory programs, each State restricts who may make retail sales to its citizens. Under Michigan law, "consumers must purchase alcoholic beverages from licensed retailers." Pet. App. (03-1116) at 5a. Licensed in-state winemakers are likewise permitted to sell at retail, although they may do so only with respect to their own products. *Id.* at 6a. Out-of-state retailers and wineries are not permitted to sell directly to Michigan consumers. *Id.* at 6a.

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[1] The parties have consented to the filing of this brief. No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation or submission of this brief. *See* S. Ct. R. 37.6.

The New York retail system is similar in most, though not all, respects. New York law provides that no one may sell alcoholic beverages at retail "without obtaining the appropriate license . . . ." N.Y. Alco. Bev. Cont. Law § 100(1), quoted in Pet. App. (03-1274) at 6a. The law further provides that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages . . . ," *id.* § 102(1)(c), quoted in Pet. App. (03-1274) at 6a, effectively barring direct sales to consumers by out-of-state vendors. Licensed wineries with an in-state physical presence may sell directly to consumers. *See* Pet. App. (03-1274) at 7a-8a. Wineries that do not meet that condition may not.

Plaintiffs challenged the regulatory systems in both States on the ground that, by prohibiting direct sales from unlicensed out-of-state wineries, the States impermissibly discriminated against interstate commerce. The Sixth Circuit upheld the challenge to Michigan's law, rejecting the idea "that a state's 'virtually complete control' [*see North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (internal quotation marks omitted)] over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." Pet. App. (03-1116) at 12a. The Second Circuit took a different view with respect to the New York law. After reviewing this Court's decisions addressing the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment, the court of appeals concluded that "New York's regulatory regime falls squarely within the ambit of Section 2's grant of authority." Pet. App. (03-1274) at 25a. The court found that the provisions limiting the privilege of direct selling to licensed in-state entities "serve[] valid regulatory interests," *id.* at 25a, "allow[ing] the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority]." *Id.* at 25a.

SUMMARY OF ARGUMENT

The short answer to the question posed by this Court is no: the statutory scheme described in the question does not "violate the dormant Commerce Clause, in light of Sec. 2 of the 21st Amendment." Whatever may be the ultimate boundaries of state authority under the Twenty-first Amendment, that authority necessarily includes—as it has for more than seven decades—the power to limit retail sales of alcohol by out-of-state vendors that are not subject to the full extent of state regulatory and taxing powers. That conclusion controls these cases. Plaintiff out-of-state wineries are not subject to the same regulatory oversight as licensed in-state sellers, and, like other out-of-state retail liquor vendors, they have no overriding constitutional right, under the Commerce Clause or any other provision, to disregard state regulatory prohibitions on making direct sales to state citizens.

I. The theory advanced by the plaintiffs—that, if a State permits in-state vendors to sell alcohol directly to consumers, it must allow out-of-state vendors to do so as well—contradicts more than 70 years of regulatory history under the Twenty-first Amendment. During that period virtually every State has required alcohol to be sold pursuant to either a state-monopoly system or a state-licensing system, under which retail sales to consumers (that is, sales for off-premises consumption) are made by in-state vendors. Those systems were implemented after the end of Prohibition precisely to ensure that States would be able to exert the greatest possible control, both as a legal and a practical matter, over those who sold alcohol to their citizens. Given the chaotic conditions that had prevailed prior to ratification of the Twenty-first Amendment, it would be historically anomalous to conclude that States, under compulsion of the dormant Commerce Clause, have been obligated all along to allow vendors across the Nation to sell alcohol directly to consumers within their borders.

Although plaintiffs seek to portray state restrictions on out-of-state consumer sales (of which the laws now at issue are an example) as nothing more than rank favoritism, those restrictions in fact serve important state interests. To begin with, they allow state and local officials to impose necessary limits on the number of vendors licensed to sell alcoholic beverages within the State and to conduct meaningful investigations, with direct community input, regarding who those vendors will be. Furthermore, the licensed vendors' in-state locations, and the importance to them of maintaining their state-granted licenses, give the States much greater power to enforce their laws regarding illegal sales, particularly sales to minors. Finally, the restriction on sales by out-of-state vendors provides concrete assurance that those privileged to sell alcohol actually collect and remit the taxes that the laws impose. That assurance is of critical importance to the States, whose support for the Twenty-first Amendment was prompted in large part by a need for enhanced tax revenues. *See* L.V. Harrison & E. Laine, *After Repeal* 173 (1936).

Plaintiffs attempt to sidestep these state interests, arguing that "temperance" is the only legitimate interest served by the Twenty-first Amendment. Because the laws here *do* serve to inhibit sales of alcohol—especially illegal sales to underage drinkers—the argument is beside the point. But it is also incorrect. As the history of post-Prohibition regulation clearly demonstrates, Section 2 of the Twenty-first Amendment not only allowed States to ban liquor sales entirely, it enabled so-called "wet" States to blunt the harmful influence of unsupervised sellers by establishing strict local control over the sale of alcohol. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) ("core § 2 power" is power "to *regulate* the sale or use of liquor within its borders") (emphasis added). Plaintiffs' alternative vision of a nationwide retail liquor market with thousands of vendors free to

sell directly to consumers—a vision that would sound the death knell of the longstanding liquor distribution system—is flatly inconsistent with that objective.

II. Despite plaintiffs' arguments to the contrary, the dormant Commerce Clause does not prevent States from instituting local control over alcohol sales. First of all, Congress has enacted the Webb-Kenyon Act, 27 U.S.C. §§ 121-22, which (in terms similar to the Twenty-first Amendment) grants broad authority to the States to limit the "shipment or transportation" of alcohol across their borders. That provision gives a federal imprimatur to state laws barring direct out-of-state liquor sales. Furthermore, Congress extended this authority at a time when it was well aware that States were seeking to control alcohol sales by restricting shipments from out-of-state vendors. Thus, even if the dormant Commerce Clause would otherwise cast doubt on the laws at issue here, Congress has effectively overridden its limitations with respect to this kind of state regulation. *See generally Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (Congress may narrow effect of dormant Commerce Clause).

In any event, the Twenty-first Amendment itself limits the effect of the dormant Commerce Clause in these circumstances. Although the Court has rejected the proposition that "the Twenty-first Amendment . . . somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]," *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has continued to recognize that, consistent with the original understanding, "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). That principle is sufficient to decide these cases. Here, Michigan and New York have promulgated laws that are directed to the most fundamental

aspect of any "liquor distribution system": who may sell alcohol directly to their citizens. In limiting the right of direct selling to in-state entities over whom the States can exercise the greatest possible oversight, the States are employing just the kind of regulatory authority that the Twenty-first Amendment is meant to protect. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *see also id.* at 447 (Scalia, J., concurring in the judgment).

The decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)—on which plaintiffs heavily rely—has little bearing on this particular question. That case involved neither importation nor transportation, the subjects to which the Twenty-first Amendment is principally addressed. Moreover, the State in that case defended its discriminatory law solely on the ground that, by providing a competitive advantage, it promoted local industry. While the Court found that particular interest to fall outside the scope of the Twenty-first Amendment, it specifically contrasted the greater deference that is given to "laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276. Here, the States are seeking to combat those evils, and the Commerce Clause does not bar them from doing so.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT AUTHORIZES STATES TO RESTRICT RETAIL SALES OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE VENDORS

Section 2 of the Twenty-first Amendment declares that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Am. XXI, § 2. That language, on its face, indicates that the States' power to control liquor traffic by restricting importation is far-reaching. Furthermore, while this Court has said that the

Twenty-first Amendment does not give States absolute authority over all matters pertaining to alcoholic beverages, *see, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has repeatedly recognized that States may exercise extensive control over the physical distribution of liquor within their borders. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Thus, in *Midcal*, the Court observed that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." 445 U.S. at 110. Likewise, in *Capital Cities*, the Court noted that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." 467 U.S. at 712.

The cases now before the Court fit squarely within those basic principles. What is at issue is simply the authority of States to control retail sales of alcohol—that is, sales for off-premises consumption—by limiting, or even banning, direct imports to consumers by out-of-state vendors. Numerous States have exercised that authority since the end of Prohibition, and it remains a significant part of most closely-regulated liquor distribution systems today. Although plaintiffs argue that, if a State permits in-state vendors to sell directly to consumers, it must allow the same for out-of-state vendors—a theory that would effectively put an end to the traditional liquor distribution system—the limitation on direct out-of-state sales continues to serve important state interests in controlling the sale of alcohol and in assuring effective tax collection. It thus advances legitimate goals that are consistent with, and protected by, the Twenty-first Amendment.[2]

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[2] In our view, it does not matter whether the Court, in deciding the constitutional question presented here, begins with analysis under the Commerce Clause or analysis under the Twenty-first Amendment. *See*

A. The idea that States may regulate liquor traffic by restricting sales from out-of-state vendors must be understood in historical context. After the tumult of the 1920s, the end of Prohibition brought with it the difficult problem of how to regulate the newly-allowed sale of alcohol. The conditions at the time were not promising: "[W]hat Prohibition did was to transfer the manufacture, sale, and distribution of liquor from legitimate to criminal forces." P. Johnson, *A History of the American People* (1999). Thus, "[i]n the early days after repeal of prohibition the nation was infested with bootleggers and racketeers anxious to continue their trade and willing to thwart the tax and health laws." *National Distributing Co., Inc. v. U.S. Treasury Dept.*, 626 F.2d 997, 1004 (D.C. Cir. 1980). *See Fedway Associates v. U.S. Treasury*, 976 F.2d 1416, 1418 (D.C. Cir. 1992) (noting congressional concern about "corruption of the newly-legal alcohol industry by bootleggers, racketeers, and other criminal types who had flourished during Prohibition.")

It fell primarily to the States, exercising their new constitutionally-recognized powers under the Twenty-first Amendment, to bring order out of this chaos. For the States, a principal goal was to get and maintain control over who could sell alcohol, and thereby to dictate to whom (and under what conditions) they could sell it. After experiencing the lawlessness of the Prohibition era, States wanted to establish laws that were aimed at controlling the excesses of liquor traffic and, perhaps just as important, to enact laws that were

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Pet. App. (03-1274) at 12a-14a. Because we believe that state laws within the scope of the Twenty-first Amendment do not violate the dormant Commerce Clause—either because the Amendment directly limits the dormant Commerce Clause or because, in any event, it "saves" certain alcohol laws from invalidation—the order of analysis seems immaterial. In the end, proper resolution of the issue turns upon whether the state laws in question are within the scope of the Twenty-first Amendment. As we discuss, the state laws here meet that standard.

enforceable. *See* R. B. Fosdick & A. L. Scott, *Toward Liquor Control* 149 (1933) (also known as the Rockefeller Report) ("[r]estrictive laws which cannot be enforced achieve success only on paper.") Furthermore, they sought to levy taxes on the sale of liquor, an ambition that had been one of the moving forces behind the repeal of Prohibition. *See* pages 17-18 *infra*.

In this environment, States saw a particular need for stringent regulation with respect to retail sales of liquor. *See Toward Liquor Control* 65 ("[v]irtually all the individual and social evils of the liquor traffic arise from an inadequately regulated and overstimulated retail sale.") In general, the States approached the problem of regulating sales to consumers in one of two ways. Following the recommendation of the influential Rockefeller Report, approximately 15 States elected to establish state monopolies over the retail sale of alcoholic beverages. In those States, "[t]he primary task of the [State Alcohol] Authority would be the establishment of a chain of its own retail stores for the sale of the heavier alcoholic beverages by package only." *Id.* 64-65. Some States, while generally following the monopoly model, provided for sales of specified products (often wine or beer) by state-licensed entities. *See* L. V. Harrison & E. Laine, *After Repeal* 110-11 (1936). By vesting control in the State itself, the monopoly system of retail distribution naturally tended to preclude direct sales to consumers by out-of-state liquor vendors.

The remaining non-dry States followed a second course—also recommended by the Rockefeller Report (but with misgivings that it would not be rigorous enough), *see Toward Liquor Control* 55-61—that focused, not upon state proprietorship, but upon strict regulation and licensing of private vendors. This system, then known as the licensing system, established a three-tier method of distribution. Under that system, producers were required to sell to licensed whole-

salers, who sold in turn to licensed retailers. *See generally McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 24 n.3 (1990) (describing three-tier system in Florida). Under this type of system, the States closely monitored both wholesalers and retailers, and only licensed retailers were permitted to sell to consumers for off-premises consumption.

The licensing system, again, did not contemplate direct interstate sales to state consumers. To the contrary, it was founded on principles of tight state, and often local, control. In particular, States and local governments sought to exert control with regard to the physical locations at which liquor would be available. Thus, for example, the authors of the Rockefeller Report stated that "[s]uitable restrictions should be established by the license law or by administrative regulation with respect to the number and character of *places* where liquor may be sold." *Toward Liquor Control* 44. The authors further recommended that "[l]icenses issued for the retail sale of liquor should run not only to the person who sells, but to the *premises* where the liquor is sold," *id.* 49, thereby making revocation of the seller's license a more powerful enforcement tool. The licensing States generally followed this regulatory blueprint. *See* B. Bernard, *Liquor Laws* 26 (1949) ("[a] license to sell alcoholic beverages" provides authority to sell alcohol "in the premises set forth by address or other description.")

The importance of local control was reinforced in many licensing States by a further restriction: that retail licenses would be issued only to residents of the State or to corporations with resident officers or shareholders. *See Liquor Laws* 25-26; *see also* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959). Indeed, in some places, state laws required residence in the county or town where the retail business was located. *See*

Liquor Laws 25-26. These laws plainly assisted authorities in evaluating the qualifications of licensees, providing a greater likelihood that applicants would be known to the community in which they sought to operate. *See After Repeal* 74-75 ("[t]wo processes are involved in determining the propriety of issuing licenses, the investigation of applicants and of the premises for which the licenses are requested, and the obtaining of community sentiment toward proposed liquor businesses.") Although it is not clear whether the residence qualification was necessary to other regulatory objectives—given the extensive regulatory control already available over the licensee and the premises themselves—it was accepted as a common feature of post-repeal regulatory schemes. Indeed, in an early case before this Court, its constitutionality was regarded as a given. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936) (discussed at page 22 *infra*).

Finally, the States bolstered local control by imposing direct bans on retail shipments from out-of-state vendors. *See* Shankar, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 356 (1999) ("States . . . passed direct shipment laws to protect the three-tier system, which otherwise could be bypassed by interstate shipment of alcohol from producers directly to consumers.") These laws did not prevent all importation of out-of-state products, but rather required that the products be distributed through the three-tier system. *See id.* at 355. In those States, the three-tier system thus served several related regulatory purposes. Not only did it protect against the notorious "tied house" between producer and retailer—*see Toward Liquor Control* 43 ("[t]he 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community.")—but it assured that direct sales to consumers would be made by licensed local merchants.

Following the end of Prohibition, therefore, it was widely understood that retail sales of liquor, far from being part of a wide-open national marketplace, instead were subject to strict state and local control. *See generally Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) ("local, not national, regulation of the liquor traffic is now the general constitutional policy.") After ratification of the Twenty-first Amendment, the States took steps to assure that, if the State was not itself the direct seller of liquor, it was at least in a position to exercise the greatest possible authority over the direct seller. No one expected that outlets in California or Illinois would be free to sell liquor directly to consumers in Michigan or New York. To the contrary, that kind of unrestrained distribution scheme, with thousands of potential sellers scattered about the Nation, was precisely what the States were seeking to foreclose.

While contemporaneous practice does not conclusively establish constitutionality, the historical evidence at least demonstrates that those enacting alcohol laws after ratification of the Twenty-first Amendment regarded limitations on retail sales by out-of-state vendors as entirely natural and legitimate under its terms. *See Alcohol Direct Shipment Laws*, at 355 (noting that laws against direct shipment have existed "in many states since the repeal of Prohibition.") Indeed, if the Twenty-first Amendment had not countenanced such restrictions, the regulatory systems of most States would have immediately been constitutionally suspect—under plaintiffs' theory of compulsory equal treatment for out-of-state retail sellers—even though they were designed to serve well-recognized, and widely heralded, regulatory goals. That is an implausible conclusion. In their efforts to clean up the liquor traffic, the States were entitled to limit direct sales by out-of-state vendors precisely because their location outside the particular regulating State made them less susceptible to the reach of that State's power.

That principle applies with full force to the laws challenged here. Although plaintiffs try to limit the focus of these cases to sales of wine alone, the distinction that they attack—between direct sales by in-state wine producers (allowed) and direct sales by out-of-state wine producers (prohibited)—is, at bottom, nothing more than an example of the larger distinction made between in-state and out-of-state retail sellers generally. Like other in-state retailers, licensed in-state wine producers are, by virtue of their situs, subject to the complete regulatory and taxing authority of their home States. By contrast, like other out-of-state retailers, out-of-state wine producers tend to operate largely beyond the authority of the individual States in which they now seek to retail their products. That difference, in our view, is decisive. Under the Twenty-first Amendment, a State seeking to control the liquor traffic within its borders need not allow retail sales by out-of-state dealers over whom it has less than full regulatory authority.[3]

B. The Commerce Clause, of course, generally discourages lines drawn between in-state and out-of-state businesses. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). But that rule has a diminished effect where regulation of liquor distribution is in question. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Twenty-first Amendment primarily created an exception to the normal operation of the Commerce Clause."); *see also* pages 21-29 *infra* (discussing effect of Twenty-first Amendment on dormant Commerce Clause). Although the dormant Commerce Clause still prohibits certain forms of pure "economic protectionism," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), it

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[3] We note that any attempt by plaintiffs to fashion a wine-specific constitutional rule would run head-long into the language of the Twenty-first Amendment, which explicitly refers to "intoxicating liquors" without making any distinctions. *See also* 27 U.S.C. § 122 (Webb-Kenyon Act) ("vinous . . . or other intoxicating liquor of any kind.")

necessarily accommodates state regulations that are designed to promote legitimate interests protected by the Twenty-first Amendment. Limitations on out-of-state retail sales directly serve those interests.

1. To begin with, the capacity to limit direct out-of-state sales allows States to exercise the greatest possible influence over the lawful sale of liquor to their citizens. Most immediately, it gives a State the threshold power to determine how many retail liquor sellers there will be. No State allows everyone who wants to sell liquor to do so: rather, in most States, licenses have long been rationed in accordance with population and local preferences. *See After Repeal* 50; *Liquor Laws* 15-17. Although the laws and practices vary among different States, it is common for States to allow local communities to have a say (or even a veto) about the grant or renewal of licenses in their vicinity. As a result, both state and local governments are able to prevent the unrestrained proliferation of retail outlets. By contrast, if States had to allow retail sales by any and all liquor vendors nationwide—as plaintiffs insist—the benefits gained by limiting the number of liquor licenses would necessarily be lost.[4]

The States also have an important interest in knowing as much as possible about who will be selling alcohol to their citizens. A central part of the traditional licensing system has always involved a detailed investigation into the qualifications and character of persons entitled to sell liquor in a

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[4] Although States theoretically could impose limits by apportioning licenses between in-state and out-of-state businesses, that solution would only make matters worse. Given the vastly greater number of potential out-of-state sellers, any proportional system (*i.e.*, any system that did not "favor" local applicants) would be severely weighted towards out-of-state sellers, undermining state efforts to impose enforceable restrictions on their licensees. It would also reduce dramatically the incidence of face-to-face transactions between buyers and sellers, thus interfering with enforcement of laws against prohibited sales.

particular community. Indeed, early observers of state regulatory systems remarked that "retail licensing" was "the most important field of licensing activity." *After Repeal* 52. Thus, for example, notices are typically posted *on site* whenever a retail seller seeks to obtain, renew, or transfer a retail liquor license, permitting those in the surrounding community to voice concerns about issuance of the license generally or about the prospective licensee in particular. To compel a State to review and investigate applications from all willing sellers everywhere—or to rely on investigations by other States applying their own criteria—would impose a significant, and undesirable, reworking of the present locally-based system. *See* Pet. App. (03-1274) at 28a.

The local licensing system not only addresses who may sell liquor, it also leads to better control over who may buy it. After Prohibition, experts took the view that "[w]hen liquor licenses are placed in the hands of trustworthy and competent persons the likelihood of subsequent liquor troubles is greatly reduced." *After Repeal* 74. In particular, the selection of licensees is part of the process for seeing that state laws barring sales to minors and the intoxicated are observed. From the ratification of the Twenty-first Amendment to the present day, all States have had laws prohibiting sales to minors. *See U.S. Dept. of Commerce, State Liquor Legislation* 156-63 (1941); *Liquor Laws* 59. Virtually all States have restrictions on sales to intoxicated persons as well. *See State Liquor Legislation* 156-63.

Proper enforcement of these laws, though concededly challenging, remains a state interest of the highest importance. But that enforcement necessarily begins with the expectation that sellers will refuse to sell to those who are not permitted to buy. To back up that expectation, States must wield (and use) the threat that state-issued licenses will be suspended or revoked for noncompliance. *See After Repeal* 215 ("[r]evocation is the only reliable complete remedy for

violations . . . .") Thus, if in-state sellers violate the State's alcohol control laws, they face the loss of their right to sell and, often, of their businesses: for example, in-state wineries would, at a minimum, forfeit their opportunity to sell directly to consumers. The stakes of noncompliance would be very different, however, for national retailers. National retail vendors, doing business across a wide spectrum of States, would have the capacity to spread, and thus minimize, the risk of disregarding state laws. As a result, even if nationwide vendors could be compelled to get licenses for each State in which they sold (a point that is by no means certain), the potential loss of any single state license, and the inability to sell directly in that State alone, would be relatively unimportant.

Finally, as both a practical and legal matter, in-state sellers are subject to far greater ongoing administrative oversight. *See* Pet. App. (03-1274) at 25a ("[p]resence ensures accountability.") By the very fact that licensees are physically located in the regulating State, enforcement officials can more readily investigate, through direct observation, whether they are conforming to the requirements of state law. *See generally Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941) (noting "peculiar difficulties of controlling [intoxicating liquor]").[5] In addition, state laws call for licensed sellers to keep detailed records on site, which are subject to review by state regulatory officials. By contrast, if State enforcement officials were forced to monitor and inspect a myriad of sellers in all other States, that administrative exercise, even if legally permissible, would be both highly impractical and needlessly costly. *See* Pet. App. (03-1274) at 28a.

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[5] Even without nationwide retail sales of alcoholic beverages, Congress has recognized the difficulties that States face in seeking to enforce their liquor laws against out-of-state entities. *See* The Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (providing federal jurisdiction for suits by state attorneys general).

2. The limitation of out-of-state retail sales is also important to another critical objective of alcohol control laws: effective tax collection. Indeed, while plaintiff wineries apparently suggest that they would be willing to collect and remit applicable taxes, they can hardly speak for all liquor vendors across the Nation, many of whom would presumably try to gain a competitive advantage by skirting state tax systems. As the Seventh Circuit has observed, "states have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). Thus, even if the States may constitutionally impose their alcohol taxes on sales by out-of-state retailers, *but see Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the practical difficulties of enforcement would be enormous.

Advocates of nationwide sales thus choose a different tack, arguing that the problem of tax collection exists with respect to all direct out-of-state sales, not just sales of alcohol. *See, e.g., Alcohol Direct Shipment Laws*, 85 Va. L. Rev. at 358. Their point appears to be that the Court should not give weight to a concern about collection of state alcohol taxes because that concern, taken to its logical conclusion, would allow States to restrict direct out-of-state sales of *any* product. *See id.* But the history of the Twenty-first Amendment is again relevant here. For taxes on alcohol are not just another kind of fungible tax on goods. Rather than being an incidental by-product of the end of Prohibition, alcohol taxes were, in themselves, an important *reason for* the end of Prohibition. Put another way, the imposition of state alcohol taxes was part of the *quid pro quo* that led to enactment and ratification of the Twenty-first Amendment in the first place.

The history itself is well-recognized. As early commentators noted, "[t]he repeal of prohibition was brought about as much by the need for revenue as by the desire to eradicate the evils that grew out of that social experiment." *After Repeal*

173; *see also id.* (advocates of repeal found motivation in a desire to "[t]urn the bootlegger's profits into public revenues"); E. Behr, *Prohibition: Thirteen Years That Changed America* 232-33 (1996). But that goal can only be served, of course, if States are actually able to collect the taxes; to obtain the revenues that they looked for, States must have the right to impose rational conditions to assure proper payment. Thus, once it is recognized that the end of Prohibition was partly set in motion by a need for alcohol taxes, it is plainly counter-historical for liquor sellers to claim that the Constitution denies the States the means of most effectively obtaining them. That theory ultimately devalues one side of the expected bargain, allowing sellers, but not States, the full benefits of repeal. *See* Pet. App. (03-1274) at 28a (noting "burden" of attempting to assure compliance with tax laws).

It is also clear that effective tax collection is important, not just as an end in itself, but as a means of repressing alcohol consumption within the State. While the overall impact is debated, it is clear, at the very least, that States have *intended* alcohol taxes to depress consumption, even as they deal with the concern that excessive taxation would cause consumers to seek out illegal sellers. Reiter, *Citizens or Sinners? The Economic and Political Inequity of 'Sin Taxes' on Tobacco and Alcohol Products*, 29 Colum. J. of Law & Soc. Prob. 443, 449 (1996). Moreover, the revenues from alcohol taxes, taken along with license fees, fund enforcement of the state liquor laws, and support programs that assist state citizens suffering from alcohol-related illnesses. If those revenues are diminished by lack of collection, it follows either that state alcohol programs must be scaled back (at a time when, under plaintiffs' proposed nationwide distribution system, the difficulties of enforcement will be vastly increased), or that funds must be siphoned away from other competing state programs. The restriction of out-of-state retail sales avoids these unpalatable and unnecessary choices, assuring that local

licensees—holding seizable assets within the taxing jurisdiction—are responsible for collecting and remitting the taxes that the laws impose.

3. Largely disregarding these state interests, plaintiffs suggest that the only legitimate goal served by the Twenty-first Amendment is "temperance." But that suggestion, even if correct, would not help them in these cases. Whatever may be said about other kinds of state restrictions, the provisions limiting sales by out-of-state sellers *do* promote temperance. As we have discussed, the traditional licensing scheme necessarily leads to sales made by local retail sellers concerned about the threat of license revocation and other severe sanctions, increasing the likelihood that they will deny sales to those persons—in particular, to minors—for whom liquor is inappropriate. That is an advancement of temperance in a most specific and critical sense. And, insofar as taxes (if collected) reduce consumption, the more general interest in temperance is advanced as well.

In any event, the idea that temperance is the only real goal of the Twenty-first Amendment rests upon a misreading of the historical record. Quite apart from the importance of tax revenues to its ratification, it is plain that the drafters and ratifiers of the Twenty-first Amendment did not envision anything approaching an open market in liquor, limited only by laws specifically intended to shelter "dry" States. Quite the opposite: as we have discussed, the focus of alcohol-related efforts following repeal of Prohibition was upon identifying and implementing effective forms of state *regulation*. *See Capital Cities Cable*, 467 U.S. at 713 ("core § 2 power" is power "to regulate the sale or use of liquor within its borders.") What the States sought to do—and what the Twenty-first Amendment permitted them to do—was to impose much tighter means of control that would provide for sales of alcohol but avoid the distribution problems of the past. The systems that they chose, including restrictions on direct out-of-state

sales, were designed to meet that goal. While plaintiffs now seek to replace those traditional systems—substituting a broad national marketplace in which out-of-state liquor sellers enjoy full benefits without being subject to full oversight—that view of liquor sales is very different from the one embodied in the Twenty-first Amendment.

II. THE DORMANT COMMERCE CLAUSE DOES NOT BAR STATES FROM RESTRICTING RETAIL SALES BY OUT-OF-STATE VENDORS

A. For several reasons, the dormant Commerce Clause does not prevent States from serving their legitimate interests in controlling alcohol distribution by limiting out-of-state retail sales. First of all, it is well-established that Congress may authorize state actions that the dormant Commerce Clause would foreclose. *See Quill Corp.*, 504 U.S. at 305; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). The Webb-Kenyon Act, by its express terms, does just that. In language similar to that of the Twenty-first Amendment, the Act prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . in violation of any law of such State . . . ." 27 U.S.C. § 122. That provision gives state laws restricting "[t]he shipment or transportation" of liquor the weight of explicit federal approval, thus removing whatever check the dormant Commerce Clause might place on laws restricting sales to consumers by out-of-state vendors.

We will not repeat the arguments made on this point by the Michigan petitioners and New York respondents, which demonstrate that the Act does what it purports to do. We note only that Congress chose to reenact the Webb-Kenyon Act at a time—1935—when it was well aware that States, under both the monopoly and three-tier licensing models, would typically be providing for retail sales only by State-controlled entities or by licensed vendors subject to comprehensive state

oversight. (As we have noted, those were the alternative systems proposed by the well-known Rockefeller Report.) It seems highly improbable, therefore, that Congress, in affirmatively prohibiting shipments of alcohol in violation of state law, somehow meant to allow free passage to retail shipments that would have fallen afoul of virtually every state regulatory system at the time. The more sensible reading of the Act is that it intended to permit States to regulate the heretofore untrammeled traffic in liquor by doing precisely what they were doing: restricting the privilege of direct selling to the State itself or to those under its full control.

B. In any event, the Twenty-first Amendment itself authorizes the laws at issue here. By its plain language, the Amendment focuses on two activities— "transportation" and "importation" for delivery or use—declaring either to be prohibited if conducted "in violation of the laws" of any State. Under any normal construction of those words, the Amendment would appear to authorize a law that bars out-of-state sellers from directly importing their alcoholic products for delivery to consumers, and the States plainly thought that it did. *See* pages 9-13 *supra*. Without question, the Amendment has that effect with respect to laws barring *all* sales of liquor. It should have the same effect as applied to regulatory schemes aimed at exercising strict control over the conditions under which alcoholic beverages may be distributed and sold.

The early cases addressing the Twenty-first Amendment certainly saw no grounds for a narrow interpretation. Although the full vitality of those cases is open to question, *see* pages 23-26 *infra*, those cases do, at least, reflect a more or less contemporaneous interpretation of what the Amendment was intended to do. Thus, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court stated that "[t]he words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which

it prescribes." *Id.* at 62. Shortly thereafter, the Court stated flatly: "Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . ." *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939). *See also Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938).

The initial cases from this Court thus were highly respectful of state regulatory authority under the Twenty-first Amendment. In addition, the Court indirectly acknowledged the important regulatory interest in having local control over alcohol distributors. In a case involving a suit brought by an out-of-state corporation, the Court dismissed a challenge to certain Pennsylvania licensing fees—which were substantially higher for distributors that sold imported beer—on the ground that the out-of-state plaintiff lacked standing to bring the suit. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936). Addressing the applicable state law, the Court noted that "no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all of its officers and directors, and fifty-one per cent of its stockholders, have been residents of the State for the period of at least two years prior to the application for a license." *Id.* at 227-28. The Court then observed that "*[t]he constitutional validity of that provision is conceded . . . .*" *Id.* at 228 (emphasis added). Because the Court accepted that the State could require in-state residence as a valid condition of granting a license, it followed automatically that an ineligible out-of-state business could not complain about how fees for that license were determined.[6]

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[6] We note that the constitutionality of "residence" requirements is not before the Court in these cases. Plaintiff wineries were denied the right to sell in Michigan and New York because they are not located in those States. *See* Pet. App. (03-1116) at 6a; Pet. App. (03-1274) at 25a. The cases thus do not involve a situation in which the location requirement is

Some years later, in *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972), the Court likewise upheld a state law requiring an out-of-state liquor producer to have a substantial presence within the State. The Court did so even though it expressly recognized that the in-state presence "served none of [the producer's] business interests," *id.* at 277, and that it made the producer subject to a South Carolina tax that it otherwise could have avoided. Despite those adverse effects, the Court found that the requirement of a significant in-state presence was part of "a regulatory scheme that serves legitimate State purposes other than assuring that the State may tax the firm's income . . . ." *Id.* at 282. *See also Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939) (approving state policy of "limiting [liquor] traffic in order to minimize well-known evils, and secure payment of revenue.")

It is true, of course, that the Court has since cast doubt on the seemingly absolute language of its early decisions. Thus, it is no longer possible to claim, if it ever was, that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]." *Hostetter*, 377 U.S. at 331-32 (rejecting that view). But our position here does not depend on that kind of expansive reading of the Twenty-first Amendment. Rather, it rests on the much more basic notion that the Twenty-first Amendment, at its core, permits the States to exercise strict control over how, and where, liquor is distributed to their citizens. That is, under the Amendment, a State may constitutionally impose restrictions on importation that rationally advance its interests in protecting against uncontrolled distribution and in safeguarding its claim to important revenues.

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satisfied but a right to sell is nonetheless denied on the ground of lack of citizenship.

That more limited principle, far from being eroded by decisions of this Court, has received repeated approval. While recent cases have struck down state laws that interfere with congressional power under the Commerce Clause, or that are incompatible with principles of other constitutional amendments, or that violate the dormant Commerce Clause by imposing a discriminatory tax, *see* pages 26-29 *infra*, no case has repudiated, or even cast serious doubt upon, the States' authority to dictate how liquor is sold within their borders. Indeed, in addressing various other questions, the Court has made clear that the power to control distribution of liquor lies at the heart of the authority that the Twenty-first Amendment grants to the States. Thus, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court recognized that "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *Id.* at 516. And, as we pointed out earlier, *see* page 7 *supra*, the Court in *Midcal* regarded the States as having "virtually complete control" over "how to structure the liquor distribution system." 445 U.S. at 110. *See also Capital Cities Cable*, 467 U.S. at 712.

Plaintiffs thus are only partly correct in asserting that the later cases of this Court have recognized an expanded role for the Commerce Clause and a less extensive role for the Twenty-first Amendment. While it is certainly true that the latter does not displace the former with respect to any and all matters involving treatment of alcohol—as it might have done in the *Young's Market* era—that does not mean that the Twenty-first Amendment takes a back seat with respect to laws within its legitimate scope. To the contrary, where the right to control how liquor is sold is at issue, the Twenty-first Amendment continues to have decisive force.

The decision in *North Dakota v. United States*, 495 U.S. 423 (1990), makes this apparent. There, the Court upheld a North Dakota statute requiring out-of-state shippers to file monthly reports and to affix labels to liquor for sale in federal enclaves within the State. Citing the "virtually complete control" standard set forth in *Midcal*, the plurality found that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *Id.* at 432 (plurality opinion); *see id.* at 438-39 (noting "extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue.") Concluding that the North Dakota regulations did not improperly single out the United States for unfavorable treatment, the plurality pointed out that under the State's three-tier system "[a]ll other liquor retailers are required to purchase from state-licensed wholesalers, who are legally bound to comply with the State's liquor distribution system." *Id.* at 439.

In a separate opinion, Justice Scalia, concurring in the judgment, addressed a question close to that presented here: whether North Dakota could require the United States to purchase its liquor from in-state wholesalers rather than from out-of-state suppliers. His conclusion was that it could. Justice Scalia first noted that "[t]he Twenty-first Amendment . . . is binding on the Federal Government like everyone else . . . ." *Id.* at 447. He then stated flatly that the Amendment "empowers North Dakota to require that all liquor sold for use in the State *be purchased from a licensed in-state wholesaler*." *Id.* (emphasis added).

The reasoning of both those opinions is directly relevant here. Like the North Dakota laws, the Michigan and New York restrictions against out-of-state retail sales serve

legitimate state interests in "controlling the distribution of liquor" and "raising revenue." *See* 495 U.S. at 439 (plurality opinion). Furthermore, they stand on the same footing as the North Dakota requirement that all retailers purchase their liquor from "licensed in-state wholesaler[s]." *See id.* at 447 (Scalia, J., concurring in the judgment). If the Twenty-first Amendment empowers a State to require all retailers (including the Federal Government) to purchase liquor only from licensed in-state vendors, it seems evident that it would also empower a State to require that its own citizens purchase liquor only from licensed in-state vendors. Although one requirement applies at the wholesale level, the other at retail, they constitute interrelated parts of a comprehensive regulatory program aimed at exercising vigorous control over the sale of liquor.[7]

C. To counter the decision in *North Dakota*, plaintiffs rely heavily on *Bacchus Imports*, which struck down part of a state tax scheme on dormant Commerce Clause grounds. But, in *Bacchus*, the tax law in question—which exempted certain local alcoholic products from a general state tax—bore, at best, an attenuated connection to the act of importation, and none at all to transportation, the two activities to which the Twenty-first Amendment is primarily addressed. Morever, the State never contended (and, seemingly, could not have contended) that the tax was an integral part of a traditional regulatory system or that it served important state interests in controlling liquor traffic and raising needed revenue. Instead, the State justified the differential treatment

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[7] Although Justice Scalia, in his opinion, did not refer to the Commerce Clause, it is fair to assume that his conclusion regarding the in-state sale requirement takes it into account. Even apart from the unqualified nature of the statement that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler" (495 U.S. at 447), the United States' option of complying with that requirement would be of no significance if it was invalid under the Commerce Clause.

solely on the ground that it promoted local industry. *See* 468 U.S. at 270-71. The Court found that particular explanation to fit poorly with the objectives safeguarded by the Twenty-first Amendment, saying that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276.

The laws at issue here, however, *are* designed to combat the evils of unrestricted liquor traffic. Like most States—whether they have chosen to implement the monopoly system or the three-tier system—Michigan and New York impose strict regulations limiting who can sell alcohol and under what conditions they can do so. Faced with the prospect of sales by thousands of producers and resellers—most of whom are beyond the full regulatory authority of any given State—the States have elected to bring the sale of liquor as close to home as possible, limiting direct sales by out-of-state dealers. That goal, unlike "mere economic protectionism," is one properly recognized and protected by the Twenty-first Amendment. *See Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) (upholding local liquor warehousing requirement on the ground that it served valid enforcement objectives.)

To be sure, a law specifically restricting sales by out-of-state entities will, by its very nature, tend to benefit in-state entities. But, contrary to what plaintiffs appear to believe, that is the beginning, not the end, of the relevant constitutional analysis. The critical question remains whether the law properly serves ends cognizable under the Twenty-first Amendment. If not, as was the case in *Bacchus*, the law cannot be "saved" by that Amendment. But if the law does serve legitimate ends, as it does here, it is not rendered invalid simply because, to serve those ends, its provisions must be directed towards out-of-state businesses. *See*

generally Toomer v. Witsell, 334 U.S. 385, 396 (1948) (under Privileges and Immunities Clause, States may favor their citizens "where there are perfectly valid independent reasons for it."); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (applying *Toomer* standard).

The other cases relied on by plaintiffs deserve only brief mention. For the most part, the cases involve conflicts between state laws regulating some aspect of the liquor trade and constitutional provisions other than the Commerce Clause. *See, e.g., 44 Liquormart, Inc., supra*; *Capital Cities Cable, supra*; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Craig v. Boren, supra*; *Hostetter, supra*. In resolving those conflicts, this Court has taken the unstartling position that, however broad the authority conferred by the Twenty-first Amendment, it does not permit States to regulate liquor traffic without regard to values embodied in other constitutional provisions like the First Amendment. As the Court observed in *Craig*, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." 429 U.S. at 206. The reverse is also true: given that their challenges are specifically grounded in the Commerce Clause, plaintiffs can find little support in decisions with respect to different constitutional provisions.

The remaining few cases, though they do at least involve the Commerce Clause, are scarcely more on point. To the extent that States have argued that the Twenty-first Amendment allows them to take actions affecting liquor pricing in other States, *see Healy v. The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court has expressed an obvious reluctance to endorse the authority of one State to export its pricing structure to other States (who, of course, have their own regulatory powers under the Twenty-first Amendment). There is no such problem here:

nothing in the Michigan or New York laws "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Healy*, 491 U.S. at 337. To the contrary, each State seeks only to exercise the fullest control over what happens *within* the State itself, protecting its ability to control distribution of alcohol against the prospect of unrestrained direct sales from outside its borders. And nothing in the Michigan or New York laws brings into question the power of the Federal Government to regulate interstate commerce with regard to alcoholic beverages, an issue that necessarily requires definition of the residual Commerce Clause power left to the Federal Government after ratification of the Twenty-first Amendment. *See, e.g., Midcal Aluminum, supra.* Indeed, to the extent that federal power is implicated here, it supports, in the form of the Webb-Kenyon Act, the proposition that in-state sales requirements are constitutionally permissible.

In short, plaintiffs are simply mistaken that, except for laws directly promoting temperance, the Commerce Clause requires an open national marketplace for retail sale of alcohol to consumers. To the contrary: the Twenty-first Amendment authorized the States, not just to prohibit or depress sales of alcohol, but to exercise strict control in order to combat the well-known problems of unregulated sales. Rather than being forced to deal with all potential liquor sellers nationwide, States have the authority to insist that sales to consumers be made only by those within the full reach of their regulatory and taxing powers. The regulations at issue here plainly are a legitimate exercise of that authority, and the Twenty-first Amendment assures their validity.

CONCLUSION

The judgment of the Sixth Circuit in Nos. 03-1116 and 03-1120 should be reversed. The judgment of the Second Circuit in No. 03-1274 should be affirmed.

Respectfully submitted,

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